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No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE L. DAVIS, JR.

Petitioner,

v.

UNITED AUTOMOBILE WORKERS,
UNITED AUTOMOBILE WORKERS LOCAL 970,
and CLAUDE PEREIRA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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App

QUESTIONS PRESENTED*

1. In a suit by a union member against his union to enforce the Landrum-Griffin Act, did the court of appeals err by deviating from the normal federal rule, which requires it to borrow the most analogous state statute of limitations, and instead relying on the six-month period for filing charges under the National Labor Relations Act, which is used for "hybrid" duty of fair representation actions against an employer and a union?

2. If the six-month period is proper in this case, did the court of appeals err in applying it retroactively to a complaint filed six years before the six-month period was first announced, where the clear precedent in the circuit in which the case was filed was that the action was timely?

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*All parties to the proceeding in the court below are listed in the caption.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Clyde L. Davis petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 13a to 19a of the appendix to this petition (hereafter "App."). The court of appeals' opinion is reported at 765 F.2d 1510 and is reprinted at App. 1a to 12a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit were issued on July 22, 1985. On September 30, 1985, Justice Powell signed an order extending the time for filing a petition for the writ of certiorari to November 15, 1985. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOKED BELOW

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, . . . Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .

STATEMENT

Petitioner Clyde L. Davis was a member and, at various times, an officer of respondent Local 970 of the United Automobile Workers, which is a small local union consisting of approximately 75 members in Jacksonville, Florida. Petitioner had serious differences with the local's president, but then assumed inactive membership status for about two years while he served as a foreman for Ford Motor Company, for which Local 970's members worked. After he left his foreman's position and returned to the bargaining unit in February, 1976, charges were filed

against him with the Local in March, 1976. The charges alleged that he had made various statements, some of which are disputed and some not, and had "belittled this Local," made accusations against officers in an "attempt to create dissension" and threatened and intimidated others. The statements, which formed the basis of his discipline, are set forth in an appendix to the decision of the court of appeals and appear *infra* at App. 10a-12a.

After a local union trial in April, 1976, which petitioner declined to attend because he said he feared that there would be a physical confrontation, he was expelled from membership by a decision of the Local 970 Executive Board issued on September 14, 1976. In October or November, 1976, Davis asked the local president for a copy of the UAW Constitution so that he could determine how to appeal his discipline, but was told that there were only enough constitutions for members and so he couldn't have one. In February, 1977, he wrote a letter to a representative of respondent United Auto Workers explaining the problem and asking for redress for unjust treatment.

Having received no response, petitioner filed suit in a Florida state court against the UAW, Local 970, and respondent Claude Pereira, a UAW official whom Davis considered to have encouraged his expulsion, on June 16, 1977 (nine months after he was expelled). His complaint alleged a conspiracy to remove him from the union for improper reasons (*i.e.*, his opposition to the union's leadership), intentional infliction of emotional injury, and removal from the union without due process. In July, 1977, respondents removed the action to the United States District Court for the Middle District of Florida, on the ground that the claim stated in Davis' complaint arose under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 401 *et seq.*, but the

case was remanded to state court in February, 1978. In May, 1978 (one year and eight months after his expulsion), petitioner filed a second complaint against the two union entities in federal court alleging that he had been expelled "contrary to federal law and [union] rules," and in August, 1978, the first action was removed to federal court where it remained.

Six years later the district court granted summary judgment for respondents on the ground that Davis had failed to exhaust his remedies before filing suit, invoking the proviso of section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4), which gives the courts discretion to stay their hands if suit is filed before exhausting internal union remedies. App. 13a-19a. Davis appealed, arguing that several of the exceptions to the discretionary exhaustion requirement applied to his case.

Several months after oral argument, however, the court asked the parties to submit supplemental briefs addressing the question of whether the case was controlled by *DelCostello v. Teamsters,* 462 U.S. 151 (1983). In *DelCostello,* this Court had created an exception to the normal federal rule under which the most analogous state statute of limitations is borrowed where Congress has not specifically provided a federal period. The Court there held that the statute of limitations for "hybrid actions" under the duty of fair representation ("DFR") and under section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, to enforce a collective bargaining agreement, was to be borrowed from the six-month period allowed by section 10(b) of the National Labor Relations Act ("NLRA") for filing unfair labor practice charges with the National Labor Relations Board.

In response, respondents – which had made this argu-

ment to the district court, but had not pursued it on appeal – accepted the court's suggestion, while Davis argued both that the limitations period should be borrowed from state law and that, if section 10(b) were applied, it should not be applied retroactively. Davis observed that several different state statutes of limitations might be applicable – tort (four years), malpractice (two years), contract (five years) or statutory actions (four years) – but that the facts of his case did not require a specific choice, inasmuch as each of these periods was longer than the time between his expulsion and even the second of his two actions (one year and eight months).

The court of appeals affirmed the grant of summary judgment on statute of limitations grounds. It recognized that there were important distinctions between hybrid actions, such as *DelCostello,* to enforce the DFR and the collective bargaining agreement, and this suit brought to redress union violations of the free speech rights guaranteed by the LMRDA. App. 7a-8a. The court specifically noted that actions such as this are brought only against the union and not against the employer, and so would not implicate the same interest in stable labor-management relationships as would a suit which challenged a settlement of a dispute under a collective bargaining agreement. App. 8a. Moreover, it concluded that a union member's right of free speech, which is expressly protected by Congress in the LMRDA, deserved greater protection against extinction by a short statute of limitations than the DFR, which had been merely implied from the NLRA, the very statute to which section 10(b) applies. *Id.*

Nevertheless, the court concluded that it was "constrained by the analysis employed in *DelCostello* to apply the same limitations period to the present lawsuit," *id.*, because this Court had based its decision largely on the danger that

uncertainty about grievance settlements might threaten labor peace: "we believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." App. 8a-9a. Without explaining how uncertainty over the restoration of petitioner's union membership or the payment of damages by his union for violating his rights might pose a similar threat to "labor peace," the court held that the six-month limitations period applied to this action.

The court also held that the decision must be applied retroactively. It recognized that "[t]he present case appears closely analogous to the situation in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971)," where this Court declined to apply a decision adopting a one-year limitations period to an action begun in the reasonable belief that a longer statute applied. App. 10a n. 14. Nevertheless, the panel again concluded that it was "bound" by a decision of another panel of the same court that *DelCostello* should be applied retroactively to hybrid DFR/contract actions which were pending when *DelCostello* was decided. *Id.*

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER LOWER COURTS AND THREATENS THE ENFORCEMENT OF THE BILL OF RIGHTS PROTECTED BY THE LMRDA.

History

With some exceptions, federal statutes do not contain their own statutes of limitations; rather, they must be borrowed from other sources. This Court has repeatedly declared that, as a general rule, courts should apply the most

closely analogous state statute of limitations. *Wilson v. Garcia,* 105 S. Ct. 1938 (1985). As a result, until very recently every court which had considered the statute of limitations question for LMRDA actions had chosen among various state statutes, such as actions arising under statute, *Copitas v. Retail Clerks,* 618 F.2d 1370 (9th Cir. 1980), injury to personal rights, *Sewell v. Machinists,* 445 F.2d 545, 548-550 (5th Cir. 1971), and tort. *Berard v. General Motors Corp.,* 493 F. Supp. 1035, 1043 (D. Mass.), *aff'd,* 657 F.2d 261 (1st Cir. 1980). Until *DelCostello,* no court of which petitioner is aware had applied any federal statute to an LMRDA action.

There is a narrow exception to the general rule, however, for cases in which the analogous state statutes would frustrate the implementation of national policies, of which the "hybrid" DFR action against a union and an employer is one example. The first time that the issue of the proper limitation period for DFR actions reached this Court was in *UPS v. Mitchell,* 451 U.S. 56 (1981). In *Mitchell,* the narrow question on which certiorari had been granted was which state statute was the most analogous for suits against employers alone, and the Court decided that the proper statute was that for a suit to vacate an arbitration award. It reasoned that this was analogous to a DFR suit against an employer, and that the time permitted for the other most analogous alternative — an action on a contract — allowed too long a period in which the propriety of the disposition of a grievance was in question, and would frustrate federal policy favoring prompt resolution of labor-management disputes.

Two years later, in *DelCostello,* the question presented was whether to apply a federal limitations period instead of any of the state alternatives in "hybrid" suits against

both employer and union. The Court reiterated its concern that several state limitations periods available for borrowing were so lengthy that employer-union compromises about the administration of a contract could remain in limbo for years, thus endangering stability in labor relations and, in the long run, labor peace. 462 U.S. at 168-169. The other most analogous statutes, however, those applied to actions to vacate arbitration awards, were so short – generally three months – that they did not give enough time for aggrieved employees to initiate suit. *Id.* at 167-168. Moreover, the Court recognized, if the most analogous state statute were applied to the employer (*i.e.*, actions to vacate an arbitration) and to the union (*i.e.*, tort, malpractice, or rights created by statute), the result would be the application of different limitations periods to two parts of the same lawsuit, which would clearly have been undesirable. *Id.* at 169 n.19.

Still, the Court said, "these objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is." *Id.* at 169. However, it found that section 10(b) of the NLRA was more appropriate than any of the state analogies, both because it had been designed by Congress to accommodate a "very similar balance of interests," *i.e.*, employee rights versus the stability of private adjustment of labor disputes, and because the DFR was itself a cause of action implied from the NLRA. *Id.* at 169-171.

The Court was careful to add the admonition that the lower courts should not too readily decline to adopt state limitation periods simply because state law may fail to provide a perfect analogy: "We stress that our holding today should not be taken as a departure from prior practices in borrowing limitations periods for federal causes of

action, *in labor law or elsewhere*. . . . [R]esort to state law remains the norm for borrowing of limitations periods [unless] a rule from elsewhere in federal law *clearly* provides a closer analogy than available state statutes, and . . . the federal policies at stake and the practicalities of litigation make that rule a *significantly more appropriate* vehicle." *Id.* at 171-172 (emphasis added).

The LMRDA Limitations Issue

This is the first case presented to this Court involving the proper statute of limitations in LMRDA actions. One other court of appeals has squarely held that LMRDA suits involving union violations similar to the discipline of Clyde Davis are governed by section 10(b). *Local 1397 v. Steelworkers*, 748 F.2d 180 (3d Cir. 1984). Other courts have applied section 10(b) to LMRDA claims which were appended as an alternate theory in suits which basically complained of violations of the duty of fair representation and sought to set aside collectively-bargained compromises between union and management. *See Vallone v Teamsters Local 705*, 755 F.2d 520 (7th Cir. 1984); *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984); *Adkins v. International Union of Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985). The issue is already engendering considerable litigation which will eventually require a decision by this Court.

Moreover, the Court of Appeals for the Second Circuit has taken precisely the opposite approach to an extension of section 10(b) outside of hybrid DFR cases, holding that its reach is limited to suits that "inevitably involve an immediate and direct impact on labor-management relations." *Monarch Long Beach Corp. v. Teamsters Local 812*, 762 F.2d 228, 231 (1985), *cert. pending*, Nos. 85-466

and 85-667. In *Monarch,* the court of appeals held that section 10(b) did not apply to a civil action under section 303 of the LMRA to enforce the secondary boycott provisions of section 8(b)(4) of the NLRA, despite the indirect involvement not only of an employer, but of a labor-management conflict as well, reasoning that the impact of the litigation itself on labor-management relations was insufficiently direct. Obviously, Davis' argument against applying section 10(b) to his case (where neither an employer nor a labor-management conflict is even indirectly involved) is *a fortiori* from *Monarch,* and the conflict in approach is yet another reason why review should be granted in this case.

The fundamental error made below and in *Local 1397* is the assumption that the NLRA is analogous to the LMRDA and that the interests and practical considerations involved make section 10(b) "a significantly more appropriate vehicle" than any state limitations period. *DelCostello,* 462 U.S. at 172. Their analysis is simple: because LMRDA cases are labor cases, and might implicate or affect, however indirectly, some facet of labor-management relations, section 10(b) must apply. On this analysis, of course, all labor cases would have a six-month limitations period, even civil rights cases (which could, after all, disrupt agreements produced by collective bargaining), but that is not the law. *Johnson v. Railway Express Agency,* 421 U.S. 454, 462 (1975); *DelCostello, supra,* 462 U.S. at 171; *Monarch Long Beach Corp., supra.*

In fact, as other courts have recognized, actions under the LMRDA are not analogous to those under the NLRA, or indeed to hybrid DFR/contract actions, and thus section 10(b) should not be applied to LMRDA suits. *Bernard v. Teamsters Local 435,* 587 F. Supp. 524 (D. Colo. 1984);

Gordon v. Winpisinger, 581 F. Supp. 234 (E.D.N.Y. 1984). A hybrid action is brought to vindicate an employee's economic rights vis-a-vis his employer under the collective bargaining agreement; if the union is involved, it is only because showing a violation of the DFR is a precondition to the right to enforce the contract against the employer, *Vaca v. Sipes,* 386 U.S. 171 (1967), and because the union may bear responsibility for a portion of the resulting economic loss. *Bowen v. Postal Service,* 459 U.S. 212 (1983). An LMRDA suit, by contrast, seeks to vindicate a union member's civil liberties or other political rights, just as an action under section 1983 against a public official or government agency might seek to redress a violation of the constitution's Bill of Rights. Furthermore, unlike the DFR, which is inferred from the NLRA itself, rights under the LMRDA were created precisely because of Congressional dissatisfaction with the failure of the NLRA, even as amended by the Taft-Hartley Act, to regulate internal union affairs and thus to protect union members from undemocratic abuses by their leaders. *See generally* McAdams, *Power and Politics in Labor Legislation* (1964). *See also Boilermakers v. Hardeman,* 401 U.S. 233, 237-241 (1971); *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 194-195 (1967). Thus, section 10(b) can scarcely be said to be the "most analogous" limitations period for LMRDA actions.

Another important difference between LMRDA and hybrid DFR actions is that, although the latter inevitably involve attacks on compromises between labor and management, which therefore create uncertainty about whether those compromises were lawful, LMRDA actions normally do not involve such questions. Rather, the usual question is whether discipline was imposed without due process or based on the exercise of free speech rights, sections

101(a)(2) and (5), or whether dues were improperly increased, section 101(a)(3), or whether union members have the right to examine books and records, section 201(c), or whether a union officer has misspent union funds. Section 501. Not only do these issues not involve labor peace or collective bargaining, but it is uniformly held that LMRDA actions cannot be filed against an employer. *E.g., Duncan v. Peninsula Shipbuilders Ass'n,* 394 F.2d 237, 239 (4th Cir. 1968). Thus, unlike DFR actions, most LMRDA suits have no direct impact on labor-management relations or on labor peace and stability.

As a theoretical matter, it is possible that the resolution of an LMRDA action might have some indirect impact on the collective bargaining relationship between the defendant union and some employers. If the LMRDA prevented Jimmy Hoffa from imposing a trusteeship on an errant local when it refused to cooperate in one of his labor shakedowns, labor-management relations might have been affected. If a union cannot increase its dues because the membership does not want a larger strike fund, perhaps the leadership will be more reluctant to call strikes. If a member such as Clyde Davis cannot be expelled because he criticizes union leaders, perhaps the result will be a less (or more) adversarial relationship with management. In this sense, some LMRDA actions may have an indirect impact on economic relations between unions and employers and on labor peace.

But in that sense, every labor case, including one under 42 U.S.C. § 1981, has such impact. Yet in *DelCostello* this Court said that, in labor cases as elsewhere, the normal rule applies – *i.e.,* there is a strong bias in favor of borrowing from state limitations periods instead of from federal law. 462 U.S. at 171-172. Thus, the mere existence

of the Congressional policy favoring the rapid disposition of labor disputes, which is embodied in section 10(b) and which was a primary basis for applying that limitation period to DFR suits, does not require that section 10(b) be used in actions by union members under the LMRDA.

Although delay in the filing of LMRDA suits does not pose a threat to stable labor-management relations, a statute of limitations as abbreviated as six months does pose a significant threat to union members' access to judicial protection. This Court recognized the problem in *DelCostello,* where it discussed the difficulty members have in deciding whether their rights have been violated, in finding counsel in a field in which almost all of the specialists represent either unions or employers, in finding money to pay the lawyer, and in performing all of the investigative and other prerequisites to suing. 462 U.S. at 166.

The problem is compounded because a discharged worker may have nothing to lose and much to gain by challenging his union and his employer for a violation of the DFR. By contrast, a union member who believes that the Landrum-Griffin Act has been violated, but who has not lost his job as a consequence, may have good reason to think twice before going to court over an abstract principle of justice and democracy. To do so, he must sue a labor official who controls hiring hall referrals, decides whether or not to process grievances, and has frequent conversations behind closed doors with representatives of the employer, in which tradeoffs are made as a matter of course and a hint that somebody's departure would by no means be lamented would be impossible to prove.

Moreover, despite the fact that Congress deliberately left the enforcement of the LMRDA to the initiative of

union members willing to file suit, in many LMRDA cases the individual plaintiff receives few tangible benefits. Rather, the principal beneficiary is the union membership as a whole, not to speak of the public interest in honest and democratic unions. In these circumstances, a statute of limitations that gives only a very short time for deciding whether to undertake the risk of suing will inevitably have the effect of unduly limiting the enforcement of the Act.

In the two years since this Court decided *DelCostello,* union defendants in LMRDA suits have seized upon that ruling in an effort to avoid defending union democracy cases on the merits. Two courts of appeals have squarely held that *DelCostello* applies to LMRDA actions, although the court below reached that result primarily because it considered itself bound to do so. The issue of the proper source for a statute of limitations for LMRDA actions will not, unlike the retroactive application of *DelCostello,* go away. The question is squarely presented in this case, and the Court should decide it now, before more resources of judges and litigants are expended, and union members' rights are denied.

The Retroactivity Issue

When petitioner was expelled in 1976, Florida was part of the Fifth Circuit, which had previously held in two separate cases that various state limitations periods governed union members' suits under the LMRDA: *Sewell v. Machinists,* 445 F.2d 545 (1971) (union discipline, one year), and *Dantagnan v. Longshoremen Local 1418,* 496 F.2d 400 (1974) (dues increase, ten years). *See also Woods v. IBEW Local 613,* 404 F. Supp. 110 (N.D. Ga. 1975) (equal rights, two years); *Copitas v. Retail Clerks,* 618 F.2d 1370 (9th Cir. 1980) (free speech, three years); *Mitch-*

ell v. IBEW Local 46, 100 LRRM 2935 (W.D. Wash. 1979) (equal rights, four years). Petitioner thus had every reason to believe that his complaint would be deemed timely so long as it was filed within the shortest applicable Florida limitation period, which was two years. If the Court decides, contrary to the argument above, that *DelCostello* requires that the six-month period of section 10(b) be applied to LMRDA suits, then the issue of the retroactivity of the six-month period in LMRDA actions will be squarely presented.

The standards for deciding whether to apply a civil decision retroactively were announced by this Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), another case in which an employee had filed suit in reliance on the equitable doctrine of laches, which seemed to be established by strong precedent, only to be caught unawares by a decision of this Court which required application of a one-year time limit. The Court said that the retroactivity question involved "three separate factors": (1) whether the decision established a new legal principle by overruling "clear past precedent" on which litigants "may have relied," or by deciding a question of first impression whose resolution was "not clearly foreshadowed"; (2) whether, on the merits of each case, applying the new rule would retard or further its operation, in light of the history, purpose and effect of the rule; and (3) whether retroactive application would produce "substantially inequitable results." 404 U.S. at 106.

By this standard, retroactivity is plainly inappropriate in this case. First, as noted above, both the old Fifth Circuit and every other court which had considered the question at the time when this action was filed, not only had applied a state statute rather than a federal one, but had applied a

limitations period that was longer than the nine months which passed between petitioner's expulsion and the date his first action was filed. Second, to paraphrase *Chevron*, 404 U.S. at 107, "a primary purpose underlying the absorption of [section 10(b)] was to aid injured employees by affording them [a limitation period that was not too short to protect their interests] . . . . Yet retroactive application of [section 10(b)] would deprive [Davis] of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." And third, "it would also produce the most 'substantial inequitable results' . . . to hold that [Davis] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him." *Id.* at 108. It is therefore plainly inequitable to apply section 10(b) retroactively to this case.

The court below reluctantly concluded that it was bound by its previous retroactivity decision in a non-LMRDA case. However, the retroactivity of *DelCostello* to DFR cases is actually a question on which the circuits are sharply divided. *Compare Edwards v. Teamsters Local 36,* 719 F.2d 1036 (9th Cir. 1983) (not retroactive) *and Carpenter v. West Virginia Flat Glass,* 763 F.2d 622 (4th Cir. 1985) (*accord*) *with, e.g., Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1983) (retroactive); *and Lincoln v. Machinists District 9,* 723 F.2d 627, 630 (8th Cir. 1983) (*accord*). Perhaps even more significant than this difference of result is the widespread confusion among the lower courts about the proper way to go about applying the *Chevron* test. *See generally* Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N. Car. L. Rev. 745 and 795-797 (1983).[1]

[1]In *Steelworkers Local 1397 v. Steelworkers,* 748 F.2d 180, 184-185 (3d Cir. 1984), the court addressed the retroactivity of the application of section 10(b) to LMRDA suits and decided that it would always be retroactively applied.

Thus, for example, the lower courts cannot agree about whether each factor must be satisfied to avoid retroactive effect, or whether all factors are balanced together or, if one factor is controlling, which factor that is. *E.g., Steelworkers Local 1397 v. Steelworkers,* 748 F.2d 180, 185 (3d Cir. 1984) (balance all three factors together); *Valencia v. Anderson Bros. Ford,* 617 F.2d 1278, 1288-1289 (7th Cir. 1980), *rev'd on other grounds,* 452 U.S. 205 (1981) (all three factors must point away from retroactive application); *Edwards v. Sea-Land Svce.,* 720 F.2d 857, 862 (5th Cir. 1983) (second factor controlling); *Singer v. Flying Tiger Line,* 652 F.2d 1349, 1353 (9th Cir. 1981) (most important is harm caused by detrimental reliance). They cannot agree about whether one case decides the question for the circuit, as did the court below, or whether a case-by-case or state-by-state analysis is appropriate. *E.g., Zemonick v. Consolidation Coal Co.,* 762 F.2d 381 (4th Cir. 1985). They cannot agree about whether the critical time for assessing the first factor is when the individual claim arose or the time of the decision whose retroactivity is in question. *See Simpson v. Director, Office of Workers Comp. Programs,* 681 F.2d 81, 86 and n. 8 (1st Cir. 1982). Some courts give weight to the fact that the decision in question was itself applied retroactively, even though the issue was not discussed, *Lincoln v. Machinists District 9,* 723 F.2d 627, 630 (8th Cir. 1984), and the Sixth Circuit takes the view that only this Court has the power to deny a decision retroactive effect. *Smith v. General Motors Corp.,* 747 F.2d 372 (1984) (en banc). Other courts do not find that issue worth considering, and indeed, in *Del Costello* the Court specifically found it unnecessary to decide the issue of retroactivity. 462 U.S. at 158 n. 11.

The result of all this confusion is that the lower courts are faced with a large number of cases raising retroactivity issues. Because *DelCostello* was decided in June, 1983, there are not very many cases left in the pipeline in which its retroactive application to hybrid DFR actions is still at issue. But if the six-month period is held applicable to LMRDA suits, the retroactivity of that holding will again consume substantial resources of both litigants and courts. Moreover, the meaning of the *Chevron* test generally is an issue which arises every time the Court issues a ruling on a statute of limitations issue or indeed many other issues. In short, this is a question of substantial importance that will not disappear, and on which the lower courts are in complete disarray. Thus, even if the Court decides that section 10(b) applies to LMRDA suits, it should also consider the retroactivity of that ruling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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